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In The

Supreme Court of the United States

October Term, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF IDAHO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

I. THE DICTUM IN *FIRST IOWA HYDRO-ELECTRIC COOPERATIVE V. FEDERAL POWER COMMISSION* MISSTATES THE INTENT OF CONGRESS IN ENACTING SECTION 27 OF THE FEDERAL POWER ACT..... 4

A. The Court's Statements in *First Iowa* Went Far Beyond That Necessary To Decide The Narrow Question Before The Court. 4

B. The Legislative History of the FPA Shows That Congress Did Not Intend for Section 9(b) to Preempt State Law..... 6

C. The *First Iowa* Decision Improperly Extrapolated Substantive Policy From Procedural Requirements. 8

D. Canons of Statutory Construction Indicate That Section 27 is Intended to Defer to State Regulation of Hydropower Water Rights..... 10

E. The Legislative History of Section 27 Reveals a Careful and Deliberate Attempt by Congress to Preserve Traditional State Powers Over Water Rights. 14

II. FERC'S EFFORTS TO ADMINISTRATIVELY ENLARGE THE SCOPE OF ITS POWERS ARE PROHIBITED BY THE FEDERAL POWER ACT AND ARE IN DIRECT CONTRADICTION TO THE EXPRESSED INTENT OF CONGRESS. ... 17

TABLE OF CONTENTS – Continued

Page

A. FERC's Administrative Interpretation of Section 10 of the FPA as Preempting State Water Law is in Conflict With Section 27 of the FPA. 17

B. FERC's Current Interpretation of the FPA is Inconsistent With Contemporaneous Administrative Construction of the Statute..... 20

III. IN ENACTING THE FEDERAL POWER ACT, CONGRESS RECOGNIZED THAT STATE REGULATION OF WATER WOULD BEST PROTECT THE PUBLIC WELFARE..... 25

A. FERC Does Not Have the Ability or the Resources to Make Water Allocation Decisions. 25

B. Section 27 Recognizes State Authority To Place Conditions Upon Hydropower Water Rights To Further State Interests..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

American Ship Building Co. v. Nat'l Labor Relations Bd., 380 U.S. 300 (1965)..... 19

Andrus v. Shell Oil Co., 446 U.S. 657 (1979)..... 20

California Federal Savings & Loan Assoc. v. Guerra, 479 U.S. 272 (1987) 19

California v. ARC America Corp., ___ U.S. ___, 109 S. Ct. 1661, 104 L.Ed.2d 86 (1989) 19

California v. Federal Energy Regulatory Comm'n, 877 F.2d 743 (9th Cir. 1989)..... 2

California v. United States, 438 U.S. 645 (1978) 1, 15, 29

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946)..... *passim*

Green v. McElroy, 360 U.S. 474 (1959)..... 18

Kansas v. Colorado, 206 U.S. 46 (1907)..... 16, 29

Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933)..... 20, 24

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 13, 14

Robertson v. Methow Valley Citizens Council, 490 U.S. ___, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) 10

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) 10

Third National Bank v. Impac Limited, Inc., 432 U.S. 312 (1977)..... 6

United States v. Menasche, 348 U.S. 528 (1955)..... 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Price, 361 U.S. 304 (1960) 18

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 10

Watt v. Alaska, 451 U.S. 259 (1981) 24

STATUTES

Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986) 17, 28

Federal Power Act, 16 U.S.C. §§ 701(a)-793, 795-818, 820-825(r) (1982 & Supp. V 1987) 1

16 U.S.C. § 803 (Supp. V 1987) 27

Alaska Stat. § 46.15.080 (1987) 26

Idaho Code §§ 42-203A – 42-203C (Supp. 1989) 27

Or. Rev. Stat. § 537.170 (1989) 26

Utah Code Ann. § 73-3-8 (1989) 26

ADMINISTRATIVE DECISIONS AND ORDERS

City of Fort Smith, 42 F.E.R.C. ¶61,362 (1988) 27

Guadalupe-Blanco River Authority, 42 F.E.R.C. ¶61,079 (1988) 10

Horseshoe Bend Hydroelectric Company, 42 F.E.R.C. ¶61,072 (1988) 26

Idaho Power Co., 14 Fed. Power Comm'n Reports 71 (1955) 26

TABLE OF AUTHORITIES – Continued

Page

Rock Creek Limited Partnership, 38 F.E.R.C. ¶61,240 (1987); 41 F.E.R.C. ¶61,198 (1987) 2

Broad River Power Co. and Lexington Water Power Co., 1 Opinions and Decisions of the Federal Power Commission 365 (1937) 24

Clarion River Power Co., 1 Opinions and Decisions of the Federal Power Commission 361 (1937) 24

In re East Bay Municipal Utilities Dist., 1 Opinions and Decisions of the Federal Power Commission 13 (1932) 24

Fed. Power Comm'n, First Annual Report (1921) 21

Fed. Power Comm'n, Second Annual Report (1922) 21

Fed. Power Comm'n, Third Annual Report (1923) 22

Fed. Power Comm'n, Fourth Annual Report (1924) 22

Fed. Power Comm'n, Seventh Annual Report (1927) 23

Fed. Power Comm'n, Eleventh Annual Report (1931) 24

Fed. Power Comm'n, Twenty-Sixth Annual Report (1946) 20

CONGRESSIONAL RECORD

51 Cong. Rec. 13944 (1914) 17

51 Cong. Rec. 14070-71 (1914) 12, 29

54 Cong. Rec. 1387 (1917) 9

TABLE OF AUTHORITIES – Continued

Page

56 Cong. Rec. 10494 (1918)..... 16

56 Cong. Rec. 9109-10 (1918)..... 9

56 Cong. Rec. 9812-14 (1918)..... 7, 8, 13

58 Cong. Rec. 2225-26 (1919)..... 9

59 Cong. Rec. 6537 (1920)..... 9

MISCELLANEOUS

1 Davis, Administrative Law Treatise (1958)..... 20

2A Sutherland, Statutory Construction (4th ed. 1984)..... 11, 12

Wolfson, Preemption and Federalism: The Missing Link, 70 Hastings L. Rev. 69 (1988)..... 19

INTEREST OF AMICI CURIAE

The physiographic, hydrologic and climatic conditions within the United States vary greatly from region to region. In recognition of this fact, the forty-nine amici states have exercised their sovereign authority to adopt water law systems tailored to their individual needs. Congress recognized that federal intrusion upon these state systems of water regulation would undo the balance each state has struck between the various uses of this finite resource and thus has consistently and purposefully deferred to the primacy of state water law in all federal enactments affecting water allocation. *California v. United States*, 438 U.S. 645, 653 (1978).

At the heart of this case is one of the most explicit Congressional actions deferring to the primacy of state water law, section 27 of the Federal Water Power Act of 1920,[1] which provides as follows:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Despite the express Congressional deference to state regulation of water rights contained in section 27, the Federal Energy Regulatory Commission (hereinafter FERC),[2] now asserts, in direct contradiction to its contemporaneous administrative construction of the FPA, that it has

---

[1] The Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920), was subsequently incorporated in the Federal Power Act of 1935, 16 U.S.C. §§ 701(a)-793, 795-818, 820-825(r) (1982 & Supp. V 1987). These two acts will be collectively referred to as the "FPA."

[2] For simplicity, both FERC and its predecessor, the Federal Power Commission, will be referred to as "FERC."

exclusive authority to set flow regimes on streams and rivers containing FERC-licensed hydroelectric projects. *Rock Creek Limited Partnership*, 38 F.E.R.C. ¶ 61,240 (1987); 41 F.E.R.C. ¶ 61,198 (1987); *aff'd, California v. Federal Energy Regulatory Comm'n*, 877 F.2d 743 (9th Cir. 1989). FERC is attempting through its orders to create a role for itself that was never intended by Congress and to establish itself as the supreme authority over decisions relating to hydropower development. If allowed to stand, the Commission's orders will create a chaotic situation in state water law.

While the Rock Creek decision only involves a conflict between by-pass flows established by FERC and by-pass flows contained in the state water right for the same project, the principle to be considered by this Court is much broader. Water rights are "highly interdependent." Each use of water affects the quantity and quality of water available for other uses; thus, uniform control of water rights is essential. Accordingly, each state has a single comprehensive system of laws controlling the complex interplay of diversion, use, conservation and reuse among a variety of competing users. Like a house of cards, removal of a state's regulatory control over a single use threatens the downfall of the entire system. Thus, the amici curiae states have a significant interest in supporting California's petition and ask that this Court reverse the decision of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

I

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), is cited by FERC as authority for its assertion that section 27 of the FPA only recognizes a right of compensation for vested water rights taken by FERC licensees. *First Iowa*, however, did not address the extensive legislative history of section 27

demonstrating the intent of Congress to defer to state regulation of hydropower water rights. Instead, the Court purported to broadly read the procedural requirements of the FPA, finding therein an implied substantive policy of preemption of state regulation. Such comments were unnecessary to decide the issue before the Court and cannot be considered controlling now that the substantive policy embodied by section 27 is squarely presented for decision.

An examination of the language and legislative history of section 27 reveals that Congress intended the states to control the granting of water rights for hydropower projects licensed under the FPA. The deference to state water laws found in section 27 is not limited to protection of proprietary rights, but instead recognizes full state regulatory authority over all aspects of water rights. Congress recognized that states were in the best position to effectively balance the competing uses of water and allocate water among those uses in accord with the public interest.

II

FERC attempts to grant itself exclusive authority over a broad range of issues associated with hydropower water rights and stream flow regimes based upon its administrative interpretation of the FPA. This broad preemption of state powers, however, can not be implied from the operation of the FPA, violates the intent of section 27, and in fact contradicts FERC's contemporaneous interpretation of section 27 of the FPA.

III

FERC's recent attempts to preempt state regulation of water have disrupted the ability of the states to ensure the orderly and efficient allocation of limited water resources among competing uses. Traditionally, Congress has deferred to state regulation of water because of the

vast physiographic and climatic differences of the states. Congress recognizes that state control of water allocation is in the best interest of the public. FERC's efforts to federalize water allocation are in conflict with the Congressional policy of deference to state water law and are furthermore unworkable. FERC's procedures for hearing issues related to issuance of a single hydropower license cannot substitute for the comprehensive information and planning abilities available to state water agencies. States retain the ability and resources to balance competing interests and reach decisions that maximize the benefits of hydropower development while minimizing the effect on other water users.

ARGUMENT

I. THE DICTUM IN FIRST IOWA HYDRO-ELECTRIC COOPERATIVE V. FEDERAL POWER COMMISSION MISSTATES THE INTENT OF CONGRESS IN ENACTING SECTION 27 OF THE FEDERAL POWER ACT.

A. The Court's Statements in First Iowa Went Far Beyond That Necessary To Decide The Narrow Question Before The Court.

In *First Iowa*, the sole question before the Court was whether section 9(b) establishes a condition precedent to the issuance of a federal hydropower license.[3] 328 U.S. at

[3] Section 9 provides:

> That each applicant for a license hereunder shall submit to the commission . . .
>
> (b) satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to

(Continued on following page)

163-64. The actual holding needed to answer that question was quite narrow: "The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license." 328 U.S. at 170. Nonetheless, the Court proceeded to condemn "duality of control" and the possibility of conflict between state and federal authority. 328 U.S. at 176 n.20. The Court avoided finding a conflict between state and federal requirements by reading into section 9(b) and 9(c) a substantive policy of preempting state laws regarding hydropower. The Court attempted to reconcile its assumption of preemption of state laws relating to hydropower by the FPA with section 27 by suggesting that the section merely protected existing water rights vested under state law.

The amici curiae states do not dispute the actual holding of *First Iowa*. The legislative history supports the conclusion that Congress did not intend section 9(b) to require compliance with state laws as a condition precedent to issuance of a federal license.[4] The amici do maintain, however, for purposes of resolving the case before it, that the *First Iowa* Court's broader and unnecessary statements regarding the substantive intent of section 9(b) were flawed, and such flaw was carried over into its

(Continued from previous page)

> the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

[4] *In First Iowa*, the Court noted that Congress rejected the following language, proposed in the Shields Bill, 65th Cong., 2d Sess., (1917): "That before the permit shall be granted under this Act, *the permittee must first obtain*, in such manner as may be required by the laws of the States, *the consent of the State or States* in which the dam or other structure for the development of water power is proposed to be constructed." (emphasis added). 328 U.S. at 179.

interpretation of section 27. Since the Court's discussion of preemption and its supporting interpretation of section 27 were not necessary to the Court's holding that compliance with state laws is not a condition precedent under section 9(b), they must be regarded as dictum.[5] Thus, *First Iowa* does not control determination of the issue of section 27's operation, which is now squarely presented to this Court for decision. *See Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 319 n.9 (1977).

B. The Legislative History of the FPA Shows that Congress did not intend for Section 9(b) to Preempt State Law.

The legislative history of section 9(b) reveals that Congress, in rejecting prior compliance with state law as a condition precedent, did not intend to preempt state control of hydropower water rights. Instead, Congress rejected the requirement of prior compliance with state law for narrow, technical reasons. Congressman Raker of California, for example, expressed his concern that requiring applicants to comply with state appropriation laws prior to issuance of a federal license would prove impossible.[6] Under most state laws, an applicant can not perfect a water right until the water is actually diverted

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[5] Although merely dictum, the Court's interpretation of section 27 in *First Iowa* has been embraced by both the Federal Energy Regulatory Commission (FERC) and the Ninth Circuit Court of Appeals. Thus, the Court's statements in *First Iowa* have dramatically diminished state authority without fully addressing Congress' intent as to the proper role of the states in hydropower licensing.

[6] Although Congressman Raker made his remarks in relation to a version of section 9(b) that only required "satisfactory evidence" of compliance, the Congressman's remarks and the subsequent colloquy demonstrate the concerns which led Congress to do away with prior compliance as a condition precedent.

and put to beneficial use.[7] Since an applicant obviously could not build a dam or other diversion structure prior to obtaining a federal license, an applicant could never comply with all aspects of a state's appropriation law prior to issuance of such license. Thus, Congressman Raker suggested amending section 9(b) to only require compliance with state laws "with respect to application for the right to appropriate, divert, and use." 56 Cong. Rec. 9812.

Congressman Raker's amendment was rejected after Congressman Mondell of Wyoming explained the intent behind the present language of section 9(b):

> The gentleman is assuming that the language which he attempts to amend requires a completed water right and a water-right certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. . . . *there are other requirements of State Law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation.* This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application.

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[7] Under the prior appropriation doctrine, once a diversion structure is completed and water actually put to use, the water right relates back to the date on which the applicant first applied for a diversion permit.

56 Cong. Rec. 9813 (emphasis added). Thus, the legislative history supports the Court's holding that compliance with state laws is not required as a condition precedent to issuance of a federal license under section 9(b). The legislative history also proves, however, that Congress did not intend to preempt state laws relating to hydropower projects but instead expected applicants to comply with a broad range of state requirements throughout the construction and operation of a hydropower project.

C. The First Iowa Decision Improperly Extrapolated Substantive Policy From Procedural Requirements.

The *First Iowa* decision assumed that the procedural requirements of the FPA implied a substantive policy of prohibiting dual state and federal control. The Court first noted that requiring licensees to comply with state permit requirements would vest the state with a "veto power" over the project, thus subordinating to the state the "comprehensive" planning authority of the Commission. 328 U.S. at 164. The Court then stated its belief that a "duplicated system" of state permits and federal licensing would be "unworkable." *Id.* at 168. Section 9 was characterized as containing the "solution" to this problem. *Id.* The Court stated:

> Section 9(c) permits the Commission to secure from the applicant "Such additional information as the commission may require." This enables it to secure, *in so far as it deems it material*, such parts or all of the information that the respective states may have prescribed in state statutes as a basis for state action.

Id. at 169 (emphasis in original). In other words, the Commission had the discretion to pick and choose which state requirements an applicant had to meet, and could ignore all others. Thus, working from the broad nature of evidence that the Commission could require of an applicant, the Court inferred a broad preemption of state

laws.[8] The Court confirmed this holding by examining the legislative history of section 9(b), finding that in enacting section 9(b), "Congress was concerned with overcoming the dangers of divided authority . . . ."[9] *Id.* at 174.

The Court's construction of the procedural and information requirements of section 9(b) as a broad-ranging preemption of traditional state powers is inconsistent with other decisions of this Court. When evaluating statutes other than the FPA, this Court has carefully refrained

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[8] The legislative history demonstrates that Congress did not understand section 9 to set any substantive policy. Indeed, in over six years of debates over the FPA, section 9 was only addressed in any depth on two occasions. 56 Cong. Rec. 9110, 9810-15 (1918). Section 9(b) is also mentioned several other times in passing. *See, e.g.*, 54 Cong. Rec. 1387 (1917); 58 Cong. Rec. 2225-26 (1919); 59 Cong. Rec. 6537 (1920).

[9] In support of its finding, the Court cited the remarks of Congressman La Follette of Colorado, emphasizing the following statement: "[W]e are trying in this bill to overcome a divided authority and pass a bill that will make it possible to get development." 328 U.S. at 174, quoting 56 Cong. Rec. 9810 (1918). As noted in California's brief, La Follette was primarily addressing the "divided authority" between the Secretaries of War, Interior, and Agriculture. Petitioner's Opening Brief at 31. To the extent, however, that La Follette was addressing the division of authority between state and federal governments, he did not advocate preemption of state authority. In an earlier colloquy, La Follette explained how the present language of section 9 resolved the problem of divided state and federal authority: "[U]nder the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible . . . ." 56 Cong. Rec. 9110 (1918). La Follette went on to disavow any intent to vest all jurisdiction over hydropower in the federal government, stating: "Under this bill the State abrogates none of its powers or rights." *Id.*

from implying substantive policy from procedural or informational requirements. An example is found in *Robertson v. Methow Valley Citizens Council*, 490 U.S.___, 109 S. Ct. 1835, 104 L.Ed.2d 351 (1989). There, this Court addressed a National Environmental Policy Act requirement that environmental impact statements discuss mitigation measures in sufficient detail to ensure that environmental consequences have been fairly evaluated. The Court held that such a requirement was procedural in nature and did not imply a substantive policy requiring that actual mitigation action be taken. 109 S. Ct. at 1847, 104 L.Ed.2d at 372. *See also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

In contrast to the *Robertson* decision, the dictum in *First Iowa* suggesting that the FPA embodies a substantive policy of federal preemption was premised upon the procedural requirements of section 9(b). Continued reliance on the *First Iowa* dictum violates the principles established in *Robertson*, and is especially inappropriate in light of the Court's professed recognition in *First Iowa* that section 27 was intended to define the substantive role of state law under the FPA.

D. Canons Of Statutory Construction Indicate That Section 27 Is Intended To Defer To State Regulation Of Hydropower Water Rights.

In *First Iowa*, the Court used principles of statutory interpretation to find that section 27 was intended to have "primary, if not exclusive reference," to protection of vested proprietary rights. 328 U.S. at 176. Relying on this dictum, FERC asserts that section 27 "only establishes a right of compensation for vested water rights taken by a Commission licensee." *Guadalupe-Blanco River Authority*, 42 F.E.R.C. ¶ 61,079 (1988). This interpretation violates normal canons of statutory construction.

Section 27 provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The *First Iowa* Court assumed that because Congress only specifically mentioned irrigation and municipal uses, its sole intent was to prevent supersedure of vested proprietary rights. The Court rejected the suggestion that the words "other uses" encompassed a broader scope of state powers. 328 U.S. at 176. In reaching this conclusion, the Court relied on the doctrine of ejusdem generis, adopting the reasoning of a 1922 district court decision that the words "other uses" are "confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." *Id.* The Court also stated that the phrase "any vested right acquired therein" further emphasized the application of section 27 to property rights. *Id.*

The above rules of construction, lightly touched upon in passing and incorporated within dictum in *First Iowa*, did not receive the consideration necessary to such an important issue. Initially, it should be noted that the doctrine of ejusdem generis only applies if a statute contains an enumeration of specific subjects that suggest a class, supplemented by a general reference. Under such conditions, the general reference is assumed to be limited to subjects within the same classification. 2A Sutherland, *Statutory Construction*, § 47.18 (4th ed. 1984).

In *First Iowa*, the Court's belief that "irrigation" and "municipal uses" suggested a class of state powers limited to protection of vested proprietary rights was

unsupported and unnecessarily narrow.[10] No special significance should attach to Congress' limiting its enumeration to irrigation and municipal uses. As noted in the Sutherland treatise on statutory construction, the human mind generally enumerates things in descending order. 2A Sutherland, § 47.19. In general, a large part of water regulation in the western states relates to irrigation and municipal use because these are the two largest uses of water. Thus, it is not especially significant that Congress chose only to enumerate irrigation and municipal uses before using the general reference to "other uses."

The legislative history also supports the conclusion that Congress did not intend the phrase "other uses" to limit the state role to protection of existing, vested rights but instead intended that water rights for hydropower projects would be integrated into the state's overall water regulatory system. For example, Congressman Taylor noted that licensees would be required to comply with all state laws necessary to appropriate the water:

> A power company must come in and put itself on the same footing and equality with other appropriators of water and make an appropriation under our laws so that those that are ahead will be ahead of water power companies authorized under this act; and those who are behind will be behind the new power company; in other words, they will have to come in on an equality with all other water users and acquire and use their water rights under our state water-right laws.

51 Cong. Rec. 14071 (1914). Further evidence that state control was intended to go beyond protection

[10] As discussed in the previous section, the Court's narrow reading of the class suggested by "irrigation and municipal uses" was prompted by its reading of section 9(b) to preempt state regulation of subjects addressed in the federal licensing process.

of vested rights is found in the remarks of Congressman Mondell of Wyoming:

> The law of the State is that [the hydropower applicant] shall make his application with certain necessary data and that there shall be in response to that inquiry [an] investigation as to whether there is water available that can be used to turn a wheel without depriving some one else of a prior right *and* whether or no the conditions are such that under the State law such water can be used at that point for power purposes.

56 Cong. Rec. 9814 (1918)(emphasis added). The members of Congress thus recognized two separate functions of state water laws: 1) protection of vested water rights, and 2) other, more general regulation of water rights under the state's police powers. Therefore, use of the phrase "other uses" cannot be said to encompass only those laws protecting vested rights.

The intent of Congress to defer to both aspects of state water law is also demonstrated by another well-established canon of construction requiring that effect be given, if possible, to every word or clause used in a statute. *Reiter v. Sonotone Corp.*, 442 U.S 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). If Congress had intended to limit section 27 to proprietary rights, it would have been sufficient to simply disclaim any intent to interfere with water rights vested under state law. Instead, Congress expressly deferred to state laws "relating to the control, appropriation, use, or distribution of water . . . or any vested right acquired therein." The sentence contains two clauses referring to separate aspects of state water law, connected by the disjunctive "or." The first clause refers to state laws regulating "control, appropriation, use or distribution of water." These are well established terms of art relating to state regulation of water rights under general police powers. The

second clause refers to state laws vesting water users with a protectable property interest. By interpreting section 27 to refer only to the proprietary rights referred to in the second clause, the Court rendered the first clause of the sentence a nullity.

Further significance is attached to the use of the word "or" to separate the two clauses. Terms separated by a disjunctive should be given separate meanings, unless the context dictates otherwise. *Reiter v. Sonotone Corp.*, 442 U.S. at 339. Thus, the second clause recognizing vested property rights cannot be properly read to modify the first clause deferring to state laws relating to the control, appropriation, use or distribution of water. A proper construction of section 27 is that the disjunctive "or" between the two phrases is intended to preserve both aspects of state water law.

E. The Legislative History Of Section 27 Reveals A Careful And Deliberate Attempt By Congress To Preserve Traditional State Powers Over Water Rights.

On its face, section 27 establishes a broad deference to state laws "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or for any vested right acquired therein." An examination of the legislative history, starting with the background against which the FPA was enacted, demonstrates that Congress' use of such broad language was not accidental, but was part of a deliberate and careful attempt to defer to all aspects of state water law.

The legislative and judicial background that led to the enactment of the major water projects bills of the

early twentieth century was exhaustively surveyed by this Court in *California v. United States*, 438 U.S. 645 (1978).[11] An examination of 7 statutes, dating from the Homestead Act of 1862 to the Reclamation Act of 1902, found a consistent intent on the part of Congress to defer to state regulation and control of water. *Id.* at 656-66. Importantly, the Court did not find that Congress' traditional deference was limited to state protection of vested proprietary rights. Instead, Congress was found to have consistently deferred to all aspects of state water law. Against this background of broad deference to state regulation, Congress enacted the Federal Power Act.

The FPA originated because of the barriers posed to hydropower development by divided state and federal authority. States controlled the beds, banks, and waters of navigable streams. While states could pass laws conferring upon individuals the right to construct hydropower dams, they could not confer the right to interfere with the federal government's navigational servitude. The risk of federal suits to assert the navigational servitude created such uncertainty that hydropower development was at a virtual standstill. The federal licensing procedure created by the FPA, therefore, was conceived as a method by which the federal government could address all issues related to the preservation and promotion of navigation and interstate commerce. 56 Cong. Rec. 9109-10 (1918) (remarks of Rep. La Follette). Other aspects of hydropower development, such as the procurement of water rights, were to remain under the control of the states. *Id.* In respect to non-navigable waters flowing through federal public lands, the relative scope of state and federal authority was even easier to define:

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[11] Although the Court undertook the survey as the background of the Reclamation Act of 1902, it is equally applicable to the FPA, enacted in 1920, because section 27 of the FPA was modelled after section 8 of the Reclamation Act of 1902.

> [A] person who desired to obtain a lease of the land adjoining the stream from the federal government would have to comply with the provisions of the laws of his State for the appropriation and use of water. I think section 27 makes it plain. . . . The State controls the use of the water, the Federal Government controls the use of the public land through which the water flows. The consent of each must be obtained: the consent of the State to the use of the water, the consent of the Federal Government to the use of the land.

56 Cong. Rec. 10494 (1918) (remarks of Senator Myers). Thus, Congress intended that the states and the federal government would work together, both exercising their respective traditional authorities, to promote hydropower development.

Another important factor in divining the understanding of Congress as to the respective roles of the state and federal governments in hydropower development is the Court decisions existing at the time the FPA was enacted. The actions of Congress were undertaken against the background of Supreme Court decisions finding that states retained "total authority" over their internal waters, subject only to the reserved rights and the navigational servitude of the United States. 438 U.S. at 662. The Court's decisions influenced the members of Congress in their deliberations on the FPA. Congressman Miller of Minnesota, for example, summarized *Kansas v. Colorado*, 206 U.S. 46 (1907), one of the most important Supreme Court decisions on the subject at that time, as follows in a 1914 debate:

> The court first clearly defines the powers of Congress over the waters of streams within the State, and then holds that the control of such streams is vested in the State, excepting only for navigation purposes. Quoting from the syllabus: " . . . While Congress has general legislative jurisdiction over the Territories and may control

> the flow of waters in their streams, *it has no power to control a like flow within the limits of a State except to preserve or improve the navigability of the stream; that the full control over those waters is, subject to the exception named, vested in the state.*

51 Cong. Rec. 13944 (1914)(emphasis added). Thus, in keeping with this Court's prior decisions, Congress could not have intended to supersede all aspects of state water laws except those protecting vested proprietary rights. Indeed, Section 27 must be interpreted in accord with the then existing belief of Congress that the constitution vested the power to control the flow of streams solely in the states, and that federal control over the water for any purpose except protection of the government's interests in navigation and federal reserved water rights would be unconstitutional.[12]

II. FERC'S EFFORTS TO ADMINISTRATIVELY ENLARGE THE SCOPE OF ITS POWERS ARE PROHIBITED BY THE FEDERAL POWER ACT AND ARE IN DIRECT CONTRADICTION TO THE EXPRESSED INTENT OF CONGRESS.

A. FERC's Administrative Interpretation of Section 10 of the FPA as Preempting State Water Law is in Conflict with Section 27 of the FPA.

FERC also attempts to justify its preemption of state water regulation on the basis of its comprehensive planning duties under section 10 of the FPA, as amended by the Electric Consumers Protection Act of 1986 (ECPA),

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[12] The amici curiae states also maintain, as discussed in California's Brief on the Merits, that the legislative history of the FPA shows a congressional intent to carry the meaning of section 8 of the Reclamation Act of 1902 into section 27 of the FPA. Petitioner's Opening Brief at 12.

Pub. L. No. 99-495, 100 Stat. 1243 (1986).[13] The comprehensive planning language contained in section 10,

[13] The respondents to this action have asserted that the absence of any legislation purporting to overturn FERC's current interpretation of section 27, as based on the dictum in *First Iowa*, represents the acquiescence of Congress to FERC's interpretation. The respondents specifically point to the fact that Congress passed the Electric Consumer Protection Act of 1986 without attempting to correct the *First Iowa* dictum regarding section 27. Brief of Respondent Rock Creek Limited Partnership in Opposition to Petition for Writ of Certiorari at 13-15; Brief of the Federal Energy Regulatory Commission in Opposition at 21.

No meaning can be artificially attached to the inaction of Congress on this issue. Nonaction by Congress on proposals to repudiate an interpretation of a statute by the federal courts affords a "most dubious foundation for drawing positive inferences" of acceptance by Congress of the courts' interpretation. *United States v. Price*, 361 U.S. 304, 310-11 (1960). It is especially inappropriate to infer Congressional ratification of FERC's interpretation of section 27, since preemption of traditional state powers over water rights invokes the principle of federalism. Decisions of great constitutional import and effect can not be relegated by default to administrators or assumed by acquiescence or nonaction. *See Green v. McElroy*, 360 U.S. 474, 506-07 (1959). Furthermore, Congress expressed its clear intent that passage of the ECPA was to have no bearing on the question of state control of hydropower water rights. Section 17 of the Act provides: "Nothing in this Act shall be construed as authorizing the appropriation of water by any Federal, State or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act – (1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource . . . . (3) alter or establish the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water-related right." 100 Stat. at 1259. Congress was thus most careful to ensure that its silence would not be interpreted as tacit approval of FERC's interpretation of the FPA.

however, can not be read to impliedly preempt the intent of Congress stated in section 27 of the FPA to defer to state water laws. Section 27 must be interpreted as it stands without regard to the preemptive effect of the FPA in general, because section 27 is an "anti-preemption" savings clause. When presented with anti-preemption language in a statute, the proper mode of inquiry is to determine what Congress intended to effect by employing such language, instead of relying on a more generalized inquiry into the preemptive effect of the statute as a whole. *California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 295 (1987) (Scalia, J., concurring).

FERC's attempts to imply preemptive intent from section 10 are also barred by fundamental principles of federalism. Preemption of traditional state powers is not favored, and should be found only where preemption is "the clear and manifest purpose of Congress." *California v. ARC America Corp.*, ___ U.S. ___, 109 S. Ct. 1661, 1665, 104 L.Ed.2d 86, 94 (1989). It is especially inappropriate for federal agencies to broadly interpret their authorizing statutes as preempting state laws. When an administrative agency attempts to expand its role beyond the parameters of its authorizing legislation, the normal deference paid to administrative interpretation "cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. Nat'l Labor Relations Bd.*, 380 U.S. 300, 318 (1965).[14]

[14] Administrative officials, not subject to electoral constraints on their exercise of power, are less likely to understand or consider the consequences of preempting state law than are members of Congress. Wolfson, *Preemption and Federalism: The Missing Link*, 70 Hastings L. Rev. 69, 101 (1988).

B. FERC's Current Interpretation Of The FPA Is Inconsistent With Contemporaneous Administrative Construction Of The Statute.

FERC's suggestions that the FPA grants FERC a broad preemption of state authority over hydropower water rights are suspect, because they are inconsistent with its contemporaneous construction of the statute. Up until 1946, FERC's predecessor, the Federal Power Commission (FPC), consistently interpreted the FPA as requiring hydropower licensees to obtain their water rights under state law. It was only after the *First Iowa* decision that the FPC adopted its present interpretation of the FPA. In its 1946 annual report, the FPC stated that its changed interpretation was based on the Supreme Court's decision, not on its own independent analysis of the FPA. Fed. Power Comm'n, Twenty-Sixth Annual Report, at 92-94 (1946).

When an agency changes its administrative interpretation, the greater value attaches to the prior construction. "Peculiar weight" is accorded the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933) (emphasis added); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-668 (1979), *see also* 1 Davis, *Administrative Law Treatise* ¶ 5.06, at 324 (1958).

Prior to 1946, the FPC consistently maintained that federally-licensed hydropower projects must fully comply with state water laws. Indeed, the FPC went so far as to find that the states have the right to "veto" projects that are unable or unwilling to comply with state laws. In its first annual report, the FPC noted that it had deferred issuing licenses to several major water projects that had failed to acquire water rights under state law, stating that

"[i]n several of the States, particularly in California, action upon applications is awaiting the approval of water rights as required by section 9(b) of the act." Fed. Power Comm'n, First Annual Report, at 27 (1921).[15]

In 1922, the FPC's Chief Legal Counsel issued a formal opinion declaring that section 9(b) requires compliance with state water law, and the opinion was approved by the FPC on January 24, 1922. The opinion stated that:

> *The applicant [for a license] must show that he has obtained, pursuant to the laws of the State, the right to appropriate, divert, and use the water for power purposes.* If the applicant has obtained, in compliance with the laws of the State, a permit for the proposed diversion, from the State engineer or other agency of the State having jurisdiction in the matter, such a permit, in my opinion, satisfies the requirement of the statute.

Fed. Power Comm'n, Second Annual Report, at 225 (1922) (emphasis added).

In 1923, the FPC's annual report described more fully the view expressed in the Chief Legal Counsel's opinion in the prior year. The report stated that:

> There is a need of harmonious action between the Nation and the States and between State and State, not only in matters of water-power development, but in the whole field of public utility relations. *The determination of a policy is, However, a responsibility of the States themselves.* The Federal Power Commission in appreciation of the desirability of common action may recommend a course which it believes should be pursued,

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[15] The State of California has lodged FERC's annual reports, opinions and decisions cited herein with the Clerk of this Court. The amici request that the Court take judicial notice of these documents under Rules 201(b), -(d) and -(f) of the Federal Rules of Evidence. California lodged the same documents with the clerk of the court below with a similar request.

> and it will, of course, exercise such authority as it has to protect, if necessary, the common interest of all the States; *but it is too thoroughly convinced of the desirability of the maintenance of State sovereignty within its legitimate sphere and of the exercise of individual State responsibility to have any intention of dictating a domestic policy for any State.*

Fed. Power Comm'n, Third Annual Report, at 8 (1923) (emphasis added).

In 1924, the FPC considered a controversy virtually identical to the instant one. A California developer applied to the FPC for a license to build a hydropower project that threatened to impair a fish resource in California's Klamath River. The FPC ruled that the project operator must acquire an appropriative water right permit under California law, and that California could impose conditions in the permit to protect the fishery resource, including conditions requiring construction of a fishway on the dam or a fish hatchery. Fed. Power Comm'n, Fourth Annual Report, at 10-11 (1924). The report stated that:

> *The development of water power on the lands of the United States requires the approval of both the State and Federal Governments, the former granting the right to use the water, the latter the right to use the land. Under the Federal water power act a license may not be issued until an applicant has secured its water rights from the appropriate State authority.* Under such circumstances it is apparent that development can proceed only when the State and the Federal Governments take corresponding action. [¶] . . . The authority to determine whether a dam shall or shall not be constructed

> rests with the State department of public works.[16]

Id. at 10, 11 (emphasis added). The FPC's position in 1924 concerning California's authority to protect the Klamath River fishery is directly contrary to FERC's position in this case concerning California's authority to protect the Rock Creek-American River fishery.

In 1927, the FPC's annual report repeated the view that state water laws apply to projects licensed under the FPA. Fed. Power Comm'n, Seventh Annual Report, at 3 (1927). The report specifically stated that the states have the right to "veto" projects that fail to comply with state laws:

> When it is necessary for both State and Federal agencies to give approval to a project before it can be built, and when certain features of a project such as its design and construction are within the authority of both agencies, it is obvious that there are possibilities of conflict, and that *it is possible for either agency to halt development by interposing its veto.*

Id. at 4 (emphasis added).

In 1931, the FPC's annual report reaffirmed that state water law applies to projects licensed under the FPA, stating that:

> The Federal Government approaches the matter of the control of water for hydroelectric purposes from two avenues: (1) By reason of the ownership of lands containing power possibilities, and (2), by such control as it may have over the navigable waters of the United States by virtue of the commerce clause of the constitution. But while the Federal water power act

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[16] The California Department of Public Works is the predecessor of the State Water Resources Control Board. Cal. Water Code § 179.

> clearly provides a policy of protecting these Federal interests, at the same time it appears that *Congress, in this legislation, perhaps more than in any other piece of legislation on similar subjects, has sought to protect and preserve to the States not only the rights, privileges, and benefits of the State in the resource itself, but its power, through local governmental action, to regulate and control the resources thus developed to the advantage of its citizens.*

Fed. Power Comm'n, Eleventh Annual Report, at 12 (1931) (emphasis added).

Later in the 1930's, the FPC issued several opinions and decisions in specific cases reaffirming its view that state water laws apply to federally-licensed hydropower projects. *In re East Bay Municipal Utilities Dist.*, 1 Opinions and Decisions of the Federal Power Commission 13 (1932)(hereinafter FPC Reports); *Clarion River Power Co.*, 1 FPC Reports at 361-62 (1937); *Broad River Power Co. and Lexington Water Power Co.*, 1 FPC Reports at 365-66 (1937).

The above citations demonstrate that in the years immediately following enactment of the FPA, the FPC consistently construed the FPA as requiring hydropower projects to comply with state water laws. Since "peculiar weight" is accorded the "contemporaneous construction" of a statute by the agency charged with its enforcement, *Norwegian Nitrogen Co. v. United States, supra*, 288 U.S. at 315, the FPC's contemporaneous interpretation supports the view that applicants for federal hydropower licenses must comply with state water laws and is entitled to substantial deference by this Court. FERC's "current interpretation, being in conflict with this initial position, is entitled to considerably less deference." *Watt v. Alaska*, 451 U.S. 259, 273 (1981). It should be found "wholly unpersuasive" here. *Id.*

III. IN ENACTING THE FEDERAL POWER ACT, CONGRESS RECOGNIZED THAT STATE REGULATION OF WATER WOULD BEST PROTECT THE PUBLIC WELFARE.

A. FERC Does Not Have the Ability or the Resources to Make Water Allocation Decisions.

FERC's assertion of authority to allocate water for hydropower water projects has disrupted, and will continue to disrupt, the ability of the states to regulate and allocate water. Although many think that hydropower facilities merely use the natural flow of a river without otherwise affecting stream flows, quite the opposite is true. Hydropower facilities affect stream flows in at least three ways. First, hydropower facilities often store water for release at times of peak power demand. Second, some hydropower facilities divert most if not all of the water from a stream into penstocks, thus, de-watering a reach of the stream. Third, the operation of hydropower facilities can cause rapid fluctuations in the flows of a river. Each of these effects will have a dramatic impact upon existing and future water uses, fisheries, recreation and aquatic habitat. Thus, if states are precluded from regulating use of water for hydropower facilities, the stability of all other state created water rights will be undermined.

Aside from disrupting existing water rights and stream uses, FERC regulation of water used for private hydropower projects prevents development of future upstream uses of water and effectively precludes state allocation of its finite water supplies. FERC usually requires that a hydropower project be designed to use all available stream flows even though the flows may be available only a fraction of the time. Thus, the full reliable water supply upstream from a project, including all tributary water, is locked up and unavailable for other uses of greater public necessity.

State allocation procedures are not limited to the protection of existing water uses, but also balance proposed uses of water as well as account for the public's interest in the use of water for wildlife, recreation, aesthetics and other public uses. *E.g.*, Alaska Stat. § 46.15.080 (1987); Or. Rev. Stat. § 537.170 (1989); Utah Code Ann. § 73-3-8 (1989). Each water allocation decision is based upon extensive water right files, hydrologic data, state water plans, and public testimony. If hydropower projects, which generally are one of the biggest water users within a river basin, are exempted from the state decision making process, then the entire process will be severly undermined. States will have no way to account in their allocation decisions for future hydropower projects that FERC might authorize.

FERC asserts that it has the ability to usurp the states' traditional role of water allocation. For example, in *Horseshoe Bend Hydroelectric Company*, 42 F.E.R.C. ¶ 61,072 (1988), the State of Idaho requested that FERC include in its hydropower license a condition recognizing the state's policy of subordinating hydropower project water use to future upstream uses. Idaho made the request because it anticipated that water from the river would be needed to support future upstream development. Instead of deferring to state water law as it had in the past,[17] FERC took upon itself to determine on a case-by-case basis whether to allow future upstream development which might affect the use of water for hydropower generation, stating:

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[17] Idaho's request for a provision recognizing the state's subordination of the hydropower project's water right was not unique. Past FERC licenses have contained clauses recognizing subordination of project water rights to future upstream consumptive use. See, Idaho Power Co., 14 Fed. Power Comm'n Reports 71, 81 (1955).

> [W]e can require the licensee to reasonably reduce its use of water for generation to coincide with reductions in flows caused by future upstream diversion if we, after consideration of all aspects of the public interest, including the need for the upstream diversion and the impact of the diversion on project generation, finances, and environmental protection measures, conclude that it would be in the public interest to accommodate such upstream diversions.

Id. at 61,325.[18] FERC based its decision upon its duty to prepare comprehensive plans pursuant to section 10 of the FPA.[19]

The "comprehensive planning" powers of FERC are no substitute for the comprehensive procedures developed by the states to balance competing uses when allocating water. Indeed, FERC itself does not prepare comprehensive plans, but instead asserts that the comprehensive planning requirement of section 10 is met by the aggregate of information developed in the record of a licensing proceeding. *City of Fort Smith*, 42 F.E.R.C. ¶ 61,362, at 62,056 (1985).

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[18] FERC's assertions that subordination of hydropower water rights will undermine the viability of a project are without foundation. Under Idaho law, the decision to reallocate water from hydropower must be found by the state to be in the public interest. See, Idaho Code §§ 42-203A – 42-203C (Supp. 1989).

[19] Section 10 directs FERC to ensure that hydropower projects are "best adapted to a comprehensive plan" fulfilling various purposes, including improvement and protection of interstate commerce, water-power, recreation, and fish and wildlife. 16 U.S.C. § 803 (Supp. V 1987). The comprehensive planning process embodied in section 10 is not exlusive to FERC. Indeed, FERC is required to ensure that the project is consistent with comprehensive plans prepared by the states. *Id.* § 803(a)(2).

Such federalization of water allocation is unworkable. A set of hearings for the limited purpose of granting a single hydropower license cannot substitute for the complex and comprehensive processes developed by the states for the allocation of water. FERC does not have at its disposal nor can it develop and review the extensive state water rights, records, hydrologic data and other information necessary to make an informed decision regarding the future water needs of a state. Further, as an agency created solely for the purpose of regulating power development, FERC has an inherent and inevitable bias in favor of hydropower uses. States, on the other hand, are free to balance competing interests and reach decisions that maximize the benefits of hydropower development while minimizing the effect on other users. Thus, state control over water allocation best promotes the general public welfare, a fact recognized by Congress when it deferred to state authority over hydropower water rights.

B. Section 27 Recognizes State Authority To Place Conditions Upon Hydropower Water Rights To Further State Interests.

This Court has consistently rejected any suggestion that the national interest would justify imposing a federal regime of water rights regulation upon the states.[20] In

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[20] Any argument that the promotion of hydroelectric development is an important national policy that overrides state and local interests is muted, if not entirely eliminated, by the passage of the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-945, 100 Stat. 1243 (1986). Section 3 of the Act indicates that hydroelectric development is not an overriding national policy by requiring FERC to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 100 Stat. at 1243.

Kansas v. Colorado, 206 U.S 46, 85-95 (1907), it was held that the federal government could not interfere with the ability of each state to adopt its own unique water law system, whether it be the riparian doctrine, the appropriation doctrine, or a combination of the two. The principle embodied in *Kansas* remains valid today. In *California v. United States*, the Court stated:

> The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences.

438 U.S. at 648. The Court went on to find that the physiographic differences between the states led to the development of differing water law doctrines in the several states. Such differences were also found to be a primary factor in the traditional deference Congress has paid to state regulation of water.

The Court's reasoning in *California*, allowing states to impose conditions on water rights granted to federal reclamation projects, applies even more strongly to water rights granted for private hydropower projects. Unlike federal reclamation projects there is no specific national policy behind these private hydropower projects. Indeed, Congress recognized this fact and included section 27 to ensure that states would have the same control over hydropower water rights that they have over other appropriators. *See, e.g.*, 51 Cong. Rec. 14071 (1914) (remarks of Rep. Taylor).

Congress in enacting the FPA was guided by the same concern this Court so eloquently stated in California v. United States, in regard to the Reclamation Act of 1902. "[L]egal confusion . . . would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S. at 669.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Ninth Circuit Court of Appeals and disavow this Court's dictum in *First Iowa* regarding the operation of section 27. Such action will restore the intended deference of Congress to state control of water rights for hydropower projects licensed under the Federal Power Act.

Respectfully submitted,

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